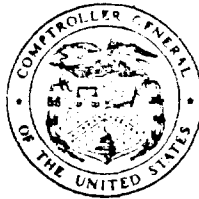


# DECISION



109028  
THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D.C. 20548

FILE: B-208936

DATE: October 27, 1982

MATTER OF: NonPublic Educational Services, Inc.

## DIGEST:

1. Protest of Service Contract Act (SCA) and wage determination provisions in IFB on basis that category of employee to work on contract was exempt from SCA coverage is untimely where not filed prior to bid opening.
2. Protest of agency rejection of bid filed with GAO more than 10 working days after protester received notice of initial adverse action on protest filed with contracting agency is untimely and will not be considered on its merits.

NonPublic Educational Services, Inc. (NESI) protests the rejection of its bid under invitation for bids (IFB) No. DAKF57-82-B-0091, issued by the Department of the Army, Fort Lewis, Washington, for various instructional services. We dismiss the protest.

The correspondence provided us by NESI indicates that in a telephone conversation with the firm after bid opening, the contracting officer expressed concern whether at its low bid price NESI could comply with its obligations under the Service Contract Act (SCA) (41 U.S.C. § 351 et seq. (1976)) and wage determination provisions in the IFB. By letter of April 28, 1982, NESI explained to the contracting officer the rationale for NESI's belief that the category of instructors called for by the solicitation were exempt from the requirement of the SCA. This letter clearly implied that NESI had prepared its bid with the anticipation that it would be exempt from these requirements.

On June 9, 1982, the Army wrote NESI explaining why, in the Army's opinion, the SCA and the pertinent wage determination were applicable to instructors engaged in providing educational services during contract performance.

In this letter, the Army also rejected NESI's bid as containing an obvious mistake in view of the minimum hourly rates required to be paid under the SCA. The contract was awarded to Central Texas College the following day.

On June 16, 1982, NESI protested to the Army, contending that its bid had been improperly rejected. By letter dated August 9, 1982, the Army informed NESI that, in view of its protest, the options in the contract awarded pursuant to the solicitation would not be exercised. However, the Army took no steps to terminate the contract which had been awarded to Central Texas College and to award the contract to NESI as the low, responsive, responsible bidder. NESI filed its protest with our Office on September 7, 1982, asserting that its bid should not have been rejected and that it should have been awarded the contract.

There are two aspects to NESI's protest; both are untimely for the reasons discussed below.

First, NESI challenges the propriety of the SCA provisions in the solicitation, contending that the category of instructors to be employed under this contract are exempt from SCA coverage. Our Bid Protest Procedures require that a protest based upon an alleged impropriety in the IFB must be filed prior to bid opening. 4 C.F.R. § 21.2(b)(1) (1982). Although the SCA provisions were in the solicitation, we have no indication that NESI questioned their inclusion until after bid opening.

Second, NESI maintains that the contracting officer erred in rejecting its bid as containing an obvious mistake because the underlying reason for rejection was that payment of the required wages at NESI's bid price would, in the contracting officer's words, put NESI in a "negative cash flow position." In reality, NESI states, this is a determination that NESI was not a responsible prospective contractor and, since NESI is a small business concern, the question of its responsibility should have been referred to the Small Business Administration under the Certificate of Competency program.

This basis for protest does not appear to have been known to NESI until it received the contracting officer's

letter of June 9, in which she communicated her determination that NESI's bid "will not be considered further but will be rejected under the provisions of [the] Defense Acquisition Regulation [relating to obvious mistakes.]" NESI filed a "formal protest" of this determination to the contracting officer by letter of June 16, asserting that the rationale for the rejection of its bid was inappropriate for the reasons we have outlined above.

The Army acted adversely to NESI's June 16 protest when, by letter of August 9, it advised NESI that in consideration of the protest it would not exercise the options available to it under Central Texas College's contract and would resolicit for these services in April 1983. This, of course, fell short of what NESI desired, which was the award of the contract. We did not receive NESI's subsequent protest to our Office until September 7.

Under our Bid Protest Procedures, if a protest has been filed initially with the contracting agency, any subsequent protest to our Office must be filed within 10 working days of notification of initial adverse agency action. 4 C.F.R. § 21.2(a). We believe NESI's June 16 protest to the contracting officer, in which NESI objected to the Army's rationale for the rejection of its bid, was timely. When the Army acted adversely to that protest on August 9, however, NESI was required to file a protest with our Office within 10 days of its receipt of the August 9 letter. The protest, however, was not filed here until September 7, clearly beyond the 10-day period permitted by our procedures.

The protest is dismissed.

*Harry R. Van Cleve*  
Harry R. Van Cleve  
Acting General Counsel